

NTSB Order No.  
EM-44

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 8th day of July 1975

O. W. SILER, Commandant, United States Coast Guard,

vs.

JAMES WALLACE, Appellant.

Docket ME-42

E R R A T A

The following change should be made in the subject order:

Page 1, change NTSB Order No. "ME-44" to "EM-44"

July 15, 1975

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O. W. Siler, Commandant, United States Coast Guard

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Docket ME-42

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming the revocation of his seaman's documents for misconduct aboard ship.<sup>1</sup> At the time in question, appellant was the holder of Merchant Mariner's Document No. Z-1179983 and, under authority thereof, had been employed as a fireman/watertender for a foreign voyage of the SS SAN JUAN, a UNITED STATES merchant vessel.

In the prior proceeding, appellant had appealed to the commandant (Appeal No. 2001) from the initial decision of Administrative Law Judge, Tilden H. Edwards, rendered after a full evidentiary hearing.<sup>2</sup> Throughout the proceedings herein, appellant has been represented by counsel.

The law judge found that the appellant, serving as aforesaid on December 13, 1972, wrongfully had marijuana and heroin in his possession when the vessel was in Kobe, Japan. This, and further

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<sup>1</sup>The appeal from the commandant's action was filed pursuant to section 5(b)(2) of the Department of Transportation Act of 1966 (49 U.S.C. 1654). Subsequently, that Act was amended by deleting section 5 under the Independent Safety Board Act of 1974 (49 U.S.C. 1901 et. seq.). The appeal now lies by virtue of section 304(a)(9)(B) of the latter Act (49 U.S.C. 1903).

<sup>2</sup> Copies of the decisions of the Commandant and the law judge are attached.

findings of the law judge concerning appellant's offense, were predicated on a Japanese judgement and certain documents referred to therein as supporting evidence.<sup>3</sup> According to the judgement, appellant was convicted in the Kobe District Court for being in possession of 8.43 grams of heroin and 6.78 grams of marijuana on that date in the engineroom of the vessel; his possession of these substances was determined to be an offense under the Narcotic and Marijuana Control Laws of Japan in that proceeding; and he was sentenced therefor on January 25, 1973.<sup>4</sup>

Appellant's defense, based on his own testimony in rebuttal, was that he was not afforded due process under the Japanese legal system. The law judge found therefrom that Japanese authorities had subjected him to lengthy and frequent interrogation following his arrest on December 13, threatened him with indefinite detention unless he signed their statements, and also denied his requests for counsel; that he signed such statements under duress and without counsel; and that Japanese counsel furnished for his court appearance failed to confer with him. The law judge held, however, that there must be an additional showing "that arguably a defense did exist [to the Japanese charge] before such collateral attack can be successful against a foreign judgement, which is valid on its face." He found that the judgement of the Japanese court was supported by adequate evidence independent of the statements appellant made to the police or at trial, and therefore recognized it as "sufficient prima facie proof" of misconduct under Coast Guard regulations. Accordingly, the law judge imposed the order of revocation.

In his brief on appeal, appellant contends that his testimony raises "an arguable possibility that the foreign conviction constitutes a miscarriage of justice, "thus shifting the burden of showing that he had a fair opportunity to defend himself in the Japanese proceedings to the Coast Guard, which it failed to carry

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<sup>3</sup>The Coast Guard presented certified copies of the foreign judicial records, under custodial and consular seal, with their English translations. The law judge excluded part of the supporting evidence on objection of appellant's counsel, while admitting "Items IV, V and VI...from that grouping,"together with the full record of judgment. No issue has been taken with respect to proper authentication of the documents thus received.

<sup>4</sup>The judgement recites that appellant was sentenced to 2 years' imprisonment, with execution of sentence suspended for a period of 5 years, as found by the Commandant.

forward.<sup>5</sup> He also contends that his conviction fails to establish the element of "guilty knowledge," essential to the seaman's offense found by the law judge. Appellant argues that he has thus satisfied the requirements of a collateral attack against the Japanese judgement, as enunciated by this Board in Commandant v. Dazey,<sup>6</sup> and that the law judge therefore lacked substantial evidence upon which to find misconduct, which finding should be set aside. Counsel for the Commandant has submitted a reply brief urging affirmance of the sanction.

Upon consideration of the briefs of the parties and the entire record, the Board concludes that the findings of the law judge are supported by substantial evidence of a probative and reliable character. In addition to our further findings herein, we adopt those of the law judge and the Commandant, on review, as our own. Moreover, we agree that the sanction in this case is warranted for seaman's misconduct prohibited by 46 U.S.C. 239(g) and the applicable regulations issued thereunder.<sup>7</sup>

Before the appellant took the stand, his counsel obtained a ruling from the law judge that the testimony to be given would be limited to the "issue of due process in the Japanese courts," and that no cross-examination "on the merits" of his conviction would be permitted (Tr. 31). The most significant consequence of this election is that he has adduced nothing whatsoever to rebut such evidence of his guilt as was produced before the court in the Japanese proceeding and at his hearing. According to that evidence, appellant was arrested during a "boarding inspection required for arriving vessels" conducted by Japanese customs. The

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<sup>5</sup>Virtually the same contention was advanced on appeal to the Commandant. Contrary to appellant's brief at that level, stating that "the foreign judgement may only be considered to the extent that it provides prima facie evidence . . . .," the Commandant's decision construed it as a contention that "the foreign judgement...did not establish a prima facie case against Appellant" (Op., p. 3). The Commandant's misconception may be disregarded with the clarification that appellant is not contending that there was no prima facie case but rather that his own testimony was successful in rebutting it.

<sup>6</sup> 1 N.T.S.B. 2212 (1970).

<sup>7</sup>Possession of drugs, including marijuana, is proscribed among those offenses by seamen for which revocation of their documents is sought under 46 CFR 5.03-5(b)(8), and for which that sanction is recommended under 46 CFR 5.20-165, Group F. See also §§5.03-3, 5.03-4.

statement of Customs Officer Taniguchi, who performed the arrest, gives the following account of appellant's somewhat suspicious" behavior in the engineeroom, which led to the discovery of contraband on his person:

"...When his eyes met the arrestor's, he turned his away too quickly and tried to place himself out of the arrestor's eyeshot. Since his attitude was considered to show some connection with violated articles [i.e, contraband] the arrestor conducted official inquiries about him and after having obtained his consent, received his personal belongings which were voluntarily submitted by the seaman."<sup>8</sup>

The officer's statement indicates that the greater share of appellant's supply of heroin was contained in six packets inside a vinyl billfold from his right hip pocket. A small capsule of heroin was found in another pocket. The marijuana was discovered in a cellophane bag and in a pack of cigarettes, one half-smoked, lodged inside his socks.<sup>9</sup> Knowledge on appellant's part that his possession of these substances was wrongful is to be inferred from these circumstances, particularly in the absence of any explanation for their secretion on his person in this manner. In our view, there is no question of the sufficiency of such evidence in establishing the seaman's offense found by the law judge.<sup>10</sup>

Moreover, there has been no adequate showing by appellant that he was denied a fair hearing in the Japanese proceeding. This contention rests on a few ambiguous references in his testimony concerning the statement he signed for the Japanese police during the detention period. He claims to have thereby established that "coercive measures were officially employed to cause[him] to renounce his insistence upon his innocence in favor of a self-incriminating statement."

Instances are first cited wherein it was testified that "he gave [the Japanese authorities] the type of statement they wanted" (Tr. 35), and that he would not have done so but for their threats

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<sup>8</sup>The customs officer's statement is included in Item VI of the evidence supporting the Japanese judgement. See n. 4, supra.

<sup>9</sup>Although suspected substances at this point, they were later confirmed as such by chemical tests described in reports prepared by the police "scientific examination laboratory." Item V at n. 3, supra.

<sup>10</sup> Commandant v. Milly, Order EM-30, adopted August 1, 1973, at n. 13.

that he would otherwise be detained indefinitely (Tr. 39). Secondly, the Coast Guard's evidence disclosing that he had pleaded not guilty in court is cited as supportive of his innocence, coupled with further testimony that an interrogator "tried to get me to admit something that wasn't true" (Tr. 37); and that he told both "the Judge and the Prosecutor [in Japan] the true story. They didn't believe that [but rather] the statement that I gave them.." (Tr. 41).

It is obvious that appellant never divulged what was contained in the statement now claimed to be his involuntary confession. In any event, we have no reason to suppose that it was self-incriminating since on cross-examination he admitted that the statement implicated others rather than himself.<sup>11</sup> We find appellant's testimony on this issue so deliberately evasive that it could in nowise serve for the purpose of shifting the burden of producing countervailing evidence to the Coast Guard.

In sum, appellant's conviction and the facts constituting his offense, as recited in the Japanese judgment, remain unrebutted. All requisite elements of his seaman's offense are readily inferred from the circumstances surrounding his arrest as reflected in documentary evidence at his trial, which is undisputed. Appellant's testimony does not tend to show either that he was denied his day in court or that his prolonged detention influenced the merits of his conviction. In each of these respects the instant case must be distinguished from that of Commandant v. Dazey, supra, where we reversed the revocation action based on an American seaman's conviction in Yokohama, Japan for possession of 0.7 gram of marijuana. In Dazey, the seaman's description of the circumstances of his arrest in a barroom of that city indicated that he had a recognizable defense to the possessory charge but had pleaded guilty thereto, after prolonged detention, out of a well founded fear that he would be detained indefinitely without trial

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<sup>11</sup>"Q. What was the nature of this statement that they wanted you to sign...? Counsel: I object, your Honor. I believe we are getting into the merits of the case. We are getting to the nature of the statement. Other than a summary statement of what it was...

Law Judge...You can answer that question generally.

Q. What was the -- in general terms, what was the nature of the statement that they wanted you to sign?

A, They wanted me to sign a statement naming other people as, you know, back on the ship, what for which--what they had featured and stuff was on there.

Q. So these statements were pertaining to persons other than yourself?

A. Yes, it does," (Tr. 40).

unless he did so.

We do not condone the failure of Japanese authorities to bring appellant to a speedy trial. Nevertheless, the Dazey rule is clearly inapplicable where, as in the instant case, the evidence of record contains nothing to show that appellant either pleaded guilty under duress, made a defense, or had one to make, at his trial in the foreign country. Under such circumstances, we will not refuse recognition to the foreign judgement which is unchallenged on its merits. It is our view, therefore, that the record contains ample evidence of appellant's misconduct, and that no reason appears therein for reversing this finding of the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The order of the Commandant affirming the law judge's revocation of appellant's seamen's documents under authority of 46 U.S.C. 239(g) be and it hereby is affirmed.

REED, Chairman, McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

(SEAL)